

RESPONSIBLE SHARES AND SHARED RESPONSIBILITY: IN DEFENSE OF RESPONSIBLE CORPORATE OFFICER LIABILITY

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When a corporation commits a crime, whom may we hold criminally liable? One obvious set of defendants consists of the individuals who perpetrated the crime on the corporation's behalf. But according to the responsible corporate officer ("RCO") doctrine, the government may also prosecute and punish those corporate executives who, although perhaps lacking "consciousness of wrongdoing," nonetheless have "a responsible share in the furtherance of the transaction which the statute outlaws." In other words, under the RCO doctrine, a corporate executive can come to bear criminal responsibility for an offense of her corporation that she neither participated in nor culpably failed to prevent. As long as the executive in question had the authority to prevent the corporate crime and failed to do so, she may be targeted in a criminal suit.

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The RCO doctrine plainly poses a challenge to our traditional understanding of criminal culpability, according to which guilt is individual—one may be held responsible only for a wrong one has personally committed, and only if one has done so with a guilty mind. Thus, RCO liability, while representing the most common instance of strict criminal liability, has been deemed “at odds with fundamental notions of our criminal justice system,” and likened to the primitive doctrine of frankpledge, under which innocent members of a group could be punished for the wrongful deed of one of their fellows. On the other hand, corporate crimes have an irreducibly collective aspect. If we take this aspect seriously, as this paper does, then departures from the paradigm of individual culpability may well be warranted. In particular, we may be justified in assigning responsibility not just to the corporate crime’s immediate perpetrators, but also to those who held prominent positions within the corporation at the time of the crime’s occurrence, and this responsibility may license just the kind of criminal liability that the RCO doctrine contemplates. This paper seeks to determine the circumstances under which this extension of responsibility is permissible, and the grounds of its permissibility.

More specifically, this Article critiques existing justifications for the doctrine by arguing that these mistakenly construe it as a kind of negligence liability, and in so doing deprive the doctrine of its transformative power. It next offers a defense of the doctrine, according to which personal guilt is not necessary, and then contends with objections to the doctrine, arguing that we need not dispense with the doctrine altogether in order to avoid the concerns of its critics. What is needed instead is a set of guidelines that guard against the doctrine’s misuse or abuse. Finally, this Article ends with a specification of these guidelines.

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I. INTRODUCTION

When the government announced that it was charging the hedge fund SAC with insider trading, the *Wall Street*

Journal responded with an editorial bearing the subtitle: “Can a criminal enterprise be run by someone who isn’t a criminal?”¹ The *Journal* was reacting to the government’s decision not to prosecute SAC’s namesake, founder, sole owner, and CEO, Steven A. Cohen. The editorial argued that if Cohen was innocent of the charges, then his corporation must be innocent as well. But we might ask instead: “If an enterprise has committed a crime, isn’t its leader necessarily a criminal?”²

This Article seeks to defend an affirmative answer to that question. In particular, the Article argues that executives should, at least in some cases, be prosecuted and punished for their corporation’s crimes independent of their participation in, or even foreknowledge of, those crimes. It seeks to provide guidelines for determining in which cases executive criminal liability is appropriate.

The question seems especially apt in light of recent and dramatic instances of corporate crime, which have led to glaringly few prosecutions of the individuals who helm the offending corporations. The government has not charged a single high-level executive at any of the Wall Street banks whose wrongdoing helped precipitate the financial crisis.³

¹ Editorial, *The Troubling SAC Case*, WALL ST. J., Jul. 26, 2013 at A12.

² This point was raised in a recent *Washington Post* online op-ed. See Amy Sepinwall, Op-Ed, *Criminal Enterprises and Culpable Leaders*, WASH. POST (Nov. 12, 2013, 9:00 AM), <http://www.washingtonpost.com/blogs/on-leadership/wp/2013/11/12/criminal-enterprises-and-culpable-leaders/>.

³ As one commentator colorfully put it, “No man or woman who led one of the firms directly culpable for the catastrophe has been put in a prison-orange jumpsuit.” Neil Irwin, *This Is a Complete List of Wall Street CEOs Prosecuted For Their Role in the Financial Crisis*, WASH. POST WONKBLOG (Sept. 12, 2013, 9:54 AM), <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/09/12/this-is-a-complete-list-of-wall-street-ceos-prosecuted-for-their-role-in-the-financial-crisis/>. See also Jesse Eisinger, *Why the SEC Won’t Hunt Big Dogs*, PROPUBLICA (Oct. 26, 2011, 11:56 AM), <http://www.propublica.org/thetrade/item/why-the-sec-wont-hunt-big-dogs> (“No major investment banker has been brought up on criminal charges stemming from the financial crisis.”); Jason Ryan, *DOJ Will Not Prosecute Goldman Sachs in Financial Crisis Probe*, ABC NEWS (Aug. 9, 2012, 8:38

Nor are executives in the financial sector unique in their apparent immunity to criminal prosecution. Inadequate controls are all too prevalent at big pharmaceutical companies, where drug recalls are at all-time highs, and yet the frequency of criminal prosecutions is appallingly low.⁴ Similarly, executives have escaped criminal liability at BP, where an explosion on the Deepwater Horizon led to eleven deaths and the worst oil spill in American history.⁵

PM), <http://abcnews.go.com/blogs/politics/2012/08/doj-will-not-prosecute-goldman-sachs-in-financial-crisis-probe/> (noting a series of “high-profile investigations” that the Department of Justice declined to prosecute); Sarah White, *RPT-In Post-Lehman Clean-Up, Top Banker Prosecutions Stumble*, REUTERS, Sep. 14, 2013, available at <http://www.reuters.com/article/2013/09/14/lehman-fiveyear-crime-idUSL5NOH929A20130914> (“In the United States, . . . no top executives at large Wall Street or commercial banks have been convicted of criminal charges relating to the 2008 crisis.”).

⁴ For example, in 2010, Johnson & Johnson issued record-breaking numbers of drug recalls. See *Johnson & Johnson's Recall Rap Sheet*, BUS. WK. MAG., Mar. 31, 2011, http://www.businessweek.com/magazine/content/11_15/b422306662101.htm; Gardiner Harris, *Johnson & Johnson Settles Bribery Complaint for \$70 Million in Fines*, N.Y. TIMES, Apr. 9, 2011, at B3 (“The company has issued more than 50 product recalls since the start of last year involving such household brands as Tylenol, Motrin, Roloids and Benadryl.”); Parija Kavilanz, *Drug Recalls Surge*, CNNMONEY (Aug. 16, 2010, 11:40 AM), http://money.cnn.com/2010/08/16/news/companies/drug_recall_surge/index.htm (describing the skyrocketing number of drug recalls over the last year, including a four-fold increase in recalls relative to the previous year). In response, the Food and Drug Administration (“FDA”) announced that it would seriously consider prosecuting individual executives. See, e.g., CNN, *FDA May Prosecute Execs over Violations: Agency Hints It Will Become More Aggressive About Enforcing Its Regulations*, CHI. TRIB., Aug. 25, 2010, at 43 (“FDA Commissioner Margaret Hamburg wrote to Sen. Chuck Grassley, R-Iowa, in March to say that the agency intends to consider ‘the appropriate use of misdemeanor prosecutions, a valuable enforcement tool, to hold responsible corporate officials accountable.’”). Yet no executives were ever charged.

⁵ So far, the government has sought to prosecute only four individuals. Two of them were supervisors on the ship. See Erin Fuchs, *The BP Prosecutions Show a New Strategy For the Justice Department*, BUS. INSIDER (Nov. 16, 2012, 11:42 AM), <http://www.businessinsider.com/who-are-the-indicted-bp-executives-2012-11>. The third, Kurt Mix, is an engineer charged with obstruction of justice after deleting text messages

Furthermore, executive impunity seems to be the norm at mining companies where substandard safety conditions lead to explosions and deaths.⁶ Executives at companies manufacturing and distributing defective products seem to enjoy similar immunity even though the entity itself might be liable in a civil suit. Those executives who knew about the defect and yet failed to recall the product or even warn the public escape unscathed.⁷

It is no surprise, then, that the public is clamoring to see the heads of these companies roll,⁸ and with good reason. For one thing, executive convictions have an undeniable deterrent power. As one commentator notes,

The threat of prison can change a culture faster and more effectively than even the heftiest fine. If, after the Texas City explosion, one BP executive or more

relating to the spill. See Susan Bozorgi, *Women Criminal Defense Attorneys: Joan McPhee Defends BP Engineer Involved in Deepwater Horizon Oil Spill*, WOMEN CRIM. DEF. ATT'YS BLOG (Feb. 20, 2013), <http://www.womencriminaldefenseattorneys.com/women-criminal-defense-attorneys-joan-mcphoe-defends-bp-engineer-involved-in-deepwater-horizon-oil-spill/>. Notably, none of them is a high-level BP official. The highest-ranking target is David Rainey, a vice-president of Gulf Coast operations, who is being prosecuted not for the spill itself but instead, like Mix, for obstructing the government's investigation. See Fuchs, *supra*.

⁶ See Howard Berkes, *Mine Disaster Probe Leads to Conspiracy Charges Against Former Executive*, NPR: THE TWO-WAY (Nov. 28, 2012, 10:11 AM), <http://www.npr.org/blogs/thetwo-way/2012/11/28/166064046/mine-disaster-probe-leads-to-conspiracy-charges-against-former-executive> ("Mining company executives are rarely charged when miners die in accidents.").

⁷ See generally Robert Steinbuch, *The Executive-Internalization Approach to High-Risk Corporate Behavior: Establishing Individual Criminal Liability for the Intentional or Reckless Introduction of Excessively Dangerous Products or Services Into The Stream Of Commerce*, 10 N.Y.U. J. LEGIS. & PUB. POL'Y 321, 321-39 (2007) (detailing reams of cases in which corporations were sued for distributing defective products but their executives were not held criminally liable).

⁸ See, e.g., *Four in Five Want Bankers Prosecuted*, SKYNEWS (July 1, 2012, 3:07 PM), <http://news.sky.com/story/954671/four-in-five-want-bankers-prosecuted>; White, *supra* note 3 ("[T]he debate over how to hold senior bank bosses to account for failures is far from over, but legal sanctions for top executives remain a largely remote threat.").

had been prosecuted, it seems to me quite likely that the Deepwater Horizon accident would never have happened. A prison sentence would have done the thing that all those fines never did: force the company to begin paying attention to safety.⁹

In addition, targeting individuals allows prosecutors to evade the purported systemic risks of going after entities that are “too big to jail,” or prompting dissolution of entities that are “too big to nail”¹⁰—e.g., those whose innocent low-level employees are then left without work, as was the fate of most of Arthur Andersen’s 28,000 employees in the wake of its demise.¹¹

Nonetheless, those intent on seeing justice done must find the legal tools with which to mete it. The problem is that criminal law typically requires that a defendant culpably cause the conduct with which she is charged, yet corporate officers in the financial, mining, or big pharmaceutical sector may not have participated in the crimes of their corporation. If we seek to prosecute corporate executives only if and where we can prove that they culpably contributed to their corporation’s crime, we will see few, if any, individual prosecutions, let alone successful ones.¹²

But we need be neither so narrow nor so exacting in our response. Instead, we can and should target executives at wrongdoing corporations *independent of whether they participated in the wrongdoing*. The requisite legal ground for doing so can be found in the responsible corporate officer

⁹ Joe Nocera, Op-Ed, *How to Prevent Oil Spills*, N.Y. TIMES, Apr. 14, 2012, at A19.

¹⁰ Kathleen M. Boozang, Symposium, *Responsible Corporate Officer Doctrine: When is Falling Down on the Job a Crime?*, 6 ST. LOUIS U. J. HEALTH L. & POL’Y 77, 87 (2012).

¹¹ See Elizabeth K. Ainslie, *Indicting Corporations Revisited: Lessons of the Arthur Andersen Prosecution*, 43 AM. CRIM. L. REV. 107, 107 (2006).

¹² See generally White, *supra* note 3 (noting the near absence of executive prosecutions in the wake of the financial crisis and explaining it in this way: “At issue is the difficulty in pinning the blame on any one person for risks and decisions taken throughout a firm—one of the main obstacles to building such cases so far.”).

(RCO) doctrine. The Supreme Court articulated the RCO doctrine in 1946, and it is designed to target those executives who, although perhaps lacking “consciousness of wrongdoing,”¹³ nonetheless have “a *responsible share* in the furtherance of the transaction which the statute outlaws.”¹⁴ In other words, the doctrine permits the prosecution and punishment of corporate executives who have not participated in their corporation’s crime, even if they had no knowledge of the crime at the time of its occurrence. Just so long as the executive in question had the authority to prevent the crime and failed to do so, she may be targeted in criminal prosecution.¹⁵ For this reason, the RCO doctrine has been deemed “potentially vastly more powerful—because lack of knowledge is not a defense—than other sources of liability for [executives] that have been much more analyzed in recent years (for example, securities laws and *Disney/Caremark/Stone v. Ritter*).”¹⁶

Perhaps because of its vast power and expansive reach, the RCO doctrine is reviled not just by the White Collar Defense bar, but also by most scholars and commentators as well.¹⁷ Their objections are of two types. The first is

¹³ United States v. Dotterweich, 320 U.S. 277, 284 (1943).

¹⁴ *Id.* (emphasis added).

¹⁵ See *infra* Part III.A.

¹⁶ Erik Gerding, *U.S. Suits Against Drug Executives: The “Responsible Corporate Officer” Doctrine Lives*, THE CONGLOMERATE (Sept. 14, 2011), <http://www.theconglomerate.org/2011/09/us-suits-against-drug-executives-the-responsible-corporate-officer-doctrine-lives.html>. Cf. Steven M. Morgan & Allison K. Obermann, *Perils of the Profession: Responsible Corporate Officer Doctrine May Facilitate a Dramatic Increase in Criminal Prosecutions of Environmental Offenders*, 45 SW. L.J. 1199, 1199–1200 (1991) (noting the broad applicability of the responsible corporate officer doctrine in the “ever expanding” criminal enforcement context).

¹⁷ See, e.g., Albert W. Alschuler, *Two Ways to Think About the Punishment of Corporations*, 46 AM. CRIM. L. REV. 1359, 1359 (2009) (likening RCO liability to the primitive doctrine of Frankpledge, under which innocent members of a group could be punished for the wrongful deed of one of their fellows); Jennifer Bragg, John Bentivoglio & Andrew Collins, *Onus of Responsibility: The Changing Responsible Corporate Officer Doctrine*, 65 FOOD & DRUG L.J. 525, 525 (2010) (contending that the doctrine is “at odds with fundamental notions of our criminal justice

principled: prosecuting and punishing executives who did not participate in the corporate crime, they argue, violates the foundational tenet of Anglo-American criminal law that “there can be no crime, large or small, without an evil mind.”¹⁸ The second is practical: even if some executives who did not participate in the corporate crime deserve to be punished, many others do not, and nothing in the RCO doctrine itself provides a principled basis upon which to distinguish between the two sets of executives. As such, the argument would go, the RCO doctrine is subject to prosecutorial over-reach and abuse.¹⁹

system”). Cf. Martin Petrin, *Circumscribing the “Prosecutor’s Ticket to Tag the Elite”—A Critique of the Responsible Corporate Officer Doctrine*, 84 TEMP. L. REV. 283, 286 (2012) (“In many cases, the RCO doctrine represents an unwarranted augmentation of corporate agents’ duties and runs contrary to established tort, criminal, and corporate law principles.”).

¹⁸ 1 JOEL PRENTISS BISHOP, CRIMINAL LAW 192 § 287 (John M. Zane and Carl Zollman eds., 9th ed. 1923). See also *Williamson v. Norris*, [1898] 1 Q. B. 7, 14 (Eng.) (“The general rule of English law is, that no crime can be committed unless there is mens rea.”).

¹⁹ Two recent examples of scholarship taking issue with the application of the RCO doctrine include Petrin, *supra* note 17 and Andrew C. Baird, Comment, *The New Park Doctrine: Missing the Mark*, 91 N.C. L. REV. 949, 952 (2013) (objecting to the exclusion from federal programs that can accompany an RCO conviction). I address problems in the application of the RCO doctrine in Part V.A, *infra*.

Richard Singer and Doug Husak have argued that even if the RCO doctrine is defensible within the context in which it has been employed—for violations of food and drug regulations—it would be untoward to seek to extend the doctrine outside of the FDA context. Richard Singer and Douglas Husak, *Of Innocence and Innocents: The Supreme Court and Mens Rea Since Herbert Packer*, 2 BUFF. CRIM. L. REV. 859, 877 (1999) (“Other cases are so easily distinguishable on their facts that *Dotterweich* and *Park*—both FDA cases—stand as the high water marks of strict criminal liability in the United States Supreme Court. Thus, any application of the general doctrine of strict criminal liability to areas outside the Food and Drug Act is problematic under the holdings of the Court—even if *Park* actually imposes strict liability.” (internal footnote omitted)). Singer and Husak are surely right that a bald transposition of the doctrine from one context to another would be illicit. The purpose of this article is to provide the justificatory tools that would render the transposition legitimate.

This Article seeks to counter these objections in three stages. First, it presents an account that justifies imposing criminal liability on the executive simply by virtue of her leadership role within the corporation. It then addresses each of the purportedly problematic applications of the RCO doctrine and argues that none of them are inevitable under the doctrine, and so none of them represent a knockdown argument against RCO liability. Finally, it articulates guidelines for the doctrine's application that will prevent its abuse.

The RCO doctrine has been disserved not just by its critics, but by its defenders as well. In response to the charge that RCO liability is an illicit form of strict criminal liability, defenders of the doctrine have justified it as a species of negligence liability instead. These defenses deviate problematically from the doctrine's original rationale, and do not adequately justify RCO liability. Nor does the doctrine find adequate support in the handful of recent calls to extend it beyond the health and environmental context.²⁰ In fact, these articles fail to take up the justificatory question at all, either because they contemplate a version of the doctrine in which the indicted officer acted negligently or worse²¹—in which case she would deserve punishment on a traditional understanding of culpability—or else they seek to defend the doctrine on deterrence or distributive justice, and not retributive, grounds.²² In this way, these calls to deploy the doctrine do

²⁰ See Christina M. Schuck, Note, *A New Use for the Responsible Corporate Officer Doctrine: Prosecuting Industry Insiders for Mortgage Fraud*, 14 LEWIS & CLARK L. REV. 372, 373 (2010); see generally Tyler O'Connor, *Prosecuting Executives for Financial Fraud: The Responsible Corporate Officer Doctrine as an Alternative Means of Criminal Liability* (Apr. 1, 2013) (draft manuscript) (on file with author) (advocating for the imposition of strict criminal liability on corporate bankers under the RCO doctrine).

²¹ See Schuck, *supra* note 20, at 379–80 (discussing theories under which individuals for a corporation are typically held criminally liable).

²² See generally O'Connor, *supra* note 20 (urging an extension of the RCO doctrine to executives at entities that have engaged in financial fraud, and arguing that the extension is beneficial because it will deter

not endeavor to establish that, on the basis of the RCO doctrine, *any* officer who plays an active role in the corporation can be held to *deserve* punishment.²³ In other words, these other efforts do not justify the very features of the doctrine that render it so radical and powerful.²⁴ This Article aims to supply the missing theoretical and practical pieces.

Part II presents an overview of the RCO doctrine and the reasons for its development. Part III traces the development of the doctrine and efforts to defend it, and argues that the proffered justifications both betray the doctrine's rationale and fail to convince. Part III ends by arguing that the doctrine can be justified, if at all, only by an account of responsibility that transcends the constraints of the individualist paradigm. Part IV seeks to provide the requisite account through an analogy to executive compensation. It notes that we reward an executive where her firm's performance improves even if the executive has not noticeably or significantly contributed to the improvement. By the same token, this Article argues, the circumstances under which we may punish an executive for her firm's wrongful act also need not require that the executive have contributed to the wrongdoing. Instead, the rationale for both rewards and punishments flows from a proper conception of the executive's role within the firm, which Part IV elucidates. With the justification for executive criminal liability in hand, Part V turns to objections to the RCO doctrine, and argues that each of them is beside the point, or otherwise unconvincing. That effort will allow us to see where the RCO doctrine has, and has not, been properly applied, and will provide guidelines for its future application, which the end of Part V articulates. Part VI concludes.

misconduct and fair because the executive is, relative to investors, the least cost avoider).

²³ An exception to this inattention to desert can be found in a piece by Kathleen Boozang, *supra* note 10, at 111–12, where she argues that corporate officers can come to deserve responsibility for the wrongs of their corporation independent of their participation in those wrongs.

²⁴ See *supra* note 17 and accompanying text.